United States Court of Appeals

for the Second Circuit

APPENDIX

Decision of Administrative Law Judge

ORIGINAL

75-4224

United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN STEVEDORES, INC., and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

against

VINCENT SALZANO,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

ON APPEAL FROM AN ORDER OF THE BENEFITS REVIEW BOARD U.S.D.L.

APPENDIX

MINORE AND MANES
Attorneys for Petitioners
11 Park Place
New York, New York

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

B
P/S

4

Decision of Benefits Review Board Filed

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Page

Decision of Administrative Law Judge, dated November 18, 1974 ..... 1a

Decision of Benefits Review Board Filed August 20, 1975 ..... 12a

Transcript of Hearing Before Administrative Law Judge McGrail, September 25, 1974 .... 21a

Congressional Record - Senate 37a

Decision of Benefits Review Board.

Decision of Administrative Law Judge Dated November 18, 1974.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210

In the Matter of	
VINCENT SALZANO Claimant	
vs.	
AMERICAN STEVEDORES, INC. Employer	Case No. 74-LHCA-266
	Formerly Case No. 96-66196
MICHIGAN MUTUAL LIABILITY CO. Carrier	

Angelo C. Gucciardo, Esquire
Israel, Adler, Ronca and Gucciardo
160 Broadway
New York, New York 10038
For the Claimant

Joseph S. Manes, Esquire
Minor and Manes
11 Park Place
New York, New York 10007
For the Carrier

Before: EDWARD H. MCGRAIL
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This case is brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., and amendments thereto (hereinafter referred to as the Act) and the Rules and Regulations implementing said statute, 20 C.F.R. Parts 701 and 702.

Decision of Administrative Law Judge.

After due notice, a hearing was held before the undersigned on September 25, 27, 1974 at New York City, New York. All parties were represented and were afforded full opportunity to be heard, to adduce evidence, to call, examine and cross-examine witnesses and make oral argument. Thereafter the parties filed briefs which have been duly considered.

Based upon the entire record in this matter and from my observation of the witnesses and their demeanor, the undersigned makes the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact and Conclusions of Law

An award for compensation was made in favor of the Claimant for temporary total disability by the Deputy Commissioner on May 31, 1967, retroactive to January 4, 1966, as a result of hearings held pursuant to the Act. The Respondent paid compensation from January 4, 1966 to July 30, 1972, a total of $24,010.00 for three hundred and forty three (343) weeks. (Cl. Exs. 12, 15). This was the maximum amount allowable under the provisions of the Act, prior to the 1972 amendments, for disability less than total, 33 U.S.C. §914(m).

Subsequent to the May 31, 1967 award, supra, a Claims Examiner of the Bureau of Employees Compensation, by letter dated March 15, 1968, advised the Carrier that the latter's letter of application for modification, dated January 23, 1968, together with a medical report of Dr. Nathaniel E. Reich, had been considered together with his earlier report and testimony prior to the award, and found no basis for favorable consideration of reducing the benefits of the Claimant at that time. (Cl. Ex. 9) It was pointed out in this letter that all factors, not only those of a medical nature, but also economic factors were considered, and specifically referred to paragraph 9 of the Deputy Commissioner's Order. (Cl. Ex. 8) This letter was followed by a letter from the Deputy Commissioner, dated March 18, 1968, wherein he stated that a study of the entire record, and of Dr. Reich's January 12, 1968 report, supported the conclusions of the Claims Examiner's letter of February 15, 1968. The Deputy Commissioner concluded his letter by stating that there did not appear to be any basis for reconsideration at that time due to a change in condition. (Cl. Ex. 11) Although no formal hearings were held, the letter of the Deputy Commissioner is taken as a formal rejection of the Carrier's application for modification of the award on the basis of change in condition.

Decision of Administrative Law Judge.

Claimant's Exhibit 10 reflects that at an informal conference for reconsideration of the award, held on June 12, 1968, the Carrier contended that the Claimant should be considered partially disabled. The memorandum of the informal conference, dated July 5, 1968, shows that a report of Dr. Reich was submitted by the Carrier in support of its position. The Claims Examiner concluded that the medical evidence submitted by the Carrier was insufficient to establish that there was a change in the Claimant's physical condition, which would warrant a finding that he could do light work. The Claims Examiner reported that in view of the economic factor, the medical report submitted was insufficient at that time to warrant a re-evaluation of the Claimant's disability found in the compensation award. (Cl. Ex. 10).

It is presumed that a similar request was made by the Carrier in 1970, since a medical report by Dr. Reich, dated June 12, 1970, was submitted to the Carrier with a copy to the Deputy Commissioner's office. (Resp. Ex. 2) Since payments continued to the Claimant in the same amounts, it is assumed that this medical report was also insufficient to establish a change in the Claimant's physical condition. (Tr. 38) It is further assumed that a similar request was made in 1972, since a copy of another report by Dr. Reich, dated April 17, 1972, was submitted to the Deputy Commissioner's office. (Resp. Ex. 3) However, the record is void of any formal decisions made by the Deputy Commissioner subsequent to 1969.

At the hearing before the undersigned, the parties not only introduced the prior transcripts and medical reports which were the basis for the Deputy Commissioner's Compensation Order of May 31, 1967, but also medical reports submitted to the Deputy Commissioner's office between that date and the effective date of the 1972 amendments. (Cl. Exs. 1,2, 5-11; Resp. Exs. 1,2). Additionally, there are in the record later medical reports and current testimony for the undersigned to consider in determining whether modification of the May 31, 1967 Compensation Order is warranted. (Cl. Exs. 3,4; Resp. Exs. 3,4).

Prior to the 1972 amendments, the Deputy Commissioner was authorized, either upon his own initiative, or upon application of any party in interest to modify a compensation award on the ground of "...a change in condition..." or,

"...because of a mistake in determination of fact..." The 1972 amendments vacated the Deputy Commissioner's jurisdiction to hold formal hearings under §922 and granted jurisdiction to his successor, the Administrative Law Judge, 33 U.S.C. §919(d). However, the basis for modification remained the same, 33 U.S.C. §922. That these are the only basis for modification is well settled. Pistorio v. Einbinder, 351 F. 2d 204 (CA D.C. 1965); Calbeck v. Suderman Stevedoring Co., 290 F. 2d 308 (5th Cir. 1961); O'Keeffe v. Aerojet General Shipyards, Inc., 404 U.S. 254, 92 S. Ct. 405 (1971), rehearing denied 404 U.S. 1053, 92 S. Ct. 702 (mandate conformed to 453 F. 2d 1363 [5th Cir. 1972]); Tudman v. American Shipbuilding Company, 170 F. 2d 842 (7th Cir. 1948). Conferences conducted by a Claims Examiner in the Office of the Deputy Commissioner do not meet the requirements of a formal hearing within the meaning of the Act.

Subsequent to the last payment by the Carrier on July 30, 1972, the Claimant filed an application on September 6, 1972 alleging permanent total disability and thereby requesting a modification under §922 of the May 31, 1967 award. Throughout the entire record in this matter no request or application was made for modification on the basis of "mistake in a determination of fact." Nor has either party alleged or proven facts which establish a mistake in the first compensation award. The continual pattern has been requests for modification based on "a change in condition." (Tr. 41, 45-47) Under such circumstances there is no basis for consideration of a modification of the award because of a mistake in the prior determination of fact. Flamm v. Hughes, 329 F. 2d 378 (2d Cir. 1964); Texas Employees Insurance Company v. Sheppard, 42 F. Supp. 669 (1939). Thus, I find that this request was timely filed within the one year statutory period, and that this request is before the undersigned to determine whether there has been a "change in condition" which would warrant a modification of the award from temporary total disability to permanent total disability.

A "change in condition" which permits a modification of a previous award means a change in the employee's physical condition from that which existed at the time of the Award for which modification is requested. Jarka Corporation v. Hughes, 299 F. 2d 534 (2d Cir. 1962); Burley Welding Works v. Lawson, 141 F. 2d 964 (5th Cir. 1944); Bay Ridge Operating Company v. Lowe, 14 F. Supp. 280 (DC NY 1936); Pillsbury v. Alaska Packers Assn., 85 F. 2d 758 (9th Cir. 1936); McCormick S.S. Co. v. U.S. Employees Compensation Commission, et al, 64 F. 2d 84 (9th Cir. 1933). In an application for review pursuant to §22 of the Act, the burden is upon the Claimant to show

that there was a change in his physical condition. Larson, Workmen's Compensation, Vol. 3, §81.33, p. 350, In re Foley's Case, 260 N.E. 2d 471 (1970), and Claimant's evidence must bear directly upon the comparison between his former and his present disability, (Id. §81.10).

The earliest medical report in this record concerning the Claimant's physical condition is the Discharge Summary of Dr. Richard Hoffman, in which the diagnosis "posterior lateral myocardial infarction" was made, and noted that the Claimant was on a routine anticoagulant therapy while in the hospital from January 3, 1966 until January 28, 1966. It was also noted that Dr. Sanford Sarney, as well as making the above diagnosis, listed "Hypercholesterolemia" as part of his final diagnosis. (Ex. 1 to 1/6/67 Hearings). The Claimant at the hearings on January 6, 1967 stated that as a result of his condition he had not returned to work; that the doctor didn't want him to do any physical work; that he was not able to climb stairs without getting winded; and that lengthy walking caused chest pains for which he took nitroglycerine tablets. (Cl. Ex. 5, pp. 18, 19).

A medical report of Dr. Harold Shub, dated October 7, 1966, noted the above subjective complaints as well as general weakness and easy fatigability. Dr. Shub commented that the Claimant presented the clinical picture of a healed myocardial infarction associated with an anginal syndrome due to coronary insufficiency and severe impairment of cardiac function and efficiency. (Cl. Ex. 1). Dr. Shub did not testify at the hearings in 1967.

Dr. Sanford Sarney, who did testify on April 14, 1967, (Cl. Ex. 6), stated that his diagnosis was "acute myocardial infarction of the posterior lateral wall of the myocardium," which was explained as an occlusion of one of the coronary arteries with a subsequent obstruction of one of the muscles of the wall of the heart. (Id., p. 71) He further testified that the Complainant complained of anginal chest pain on exertion, and that the Claimant showed a hypercholesterol rate which predisposed the patient to just what the Claimant had sustained, coronary infarction and angina. (Id., pp. 84, 85) Further, that hypercholesterolemia predisposes to hardening of the coronary arteries and that hardening of the arteries would lead to coronary infarction. (Id., p. 89)

Decision of Administrative Law Judge.

Dr. Nathaniel Reich, who testified for the Carrier on April 25, 1967 (Cl. Ex. 7), diagnosed the Claimant's condition after his examination on July 1, 1966 (Cl. Ex. A to 4/25/67 Hearings), as "Arteriosclerotic heart disease with postero-lateral wall myocardial infarction, well compensated." At that time Dr. Reich testified that the hypercholesterolemia diagnosed by the hospital predisposed the Claimant to accelerated and marked disposition of cholesterol within the coronary arteries causing the arteries to become insidiously and progressively narrow. (Cl. Ex. 7, p. 114). Dr. Reich's opinion then was that the Claimant should resume appropriate work within his tolerance as soon as possible. He noted that the Claimant was being given anticoagulants to avoid future thrombosis.

Subsequent to the Deputy Commissioner' Compensation Award, which also found that the Claimant was afflicted with a pre-existing arteriosclerotic heart disease (Cl. Ex. 8, ¶8), the Claimant was examined by Dr. Reich on January 12, 1968. At that time, it was noted that Claimant was taking anticoagulants and nitroglycerine tablets, but that he showed no evidence of myocardial insufficiency. (Resp. Ex. 1) Dr. Reich concluded in a medical report on his examination of the Claimant on June 12, 1970, that the Claimant had done well since his last examination, that he had a mild partial disability and that he could perform light sedentary work. (Resp. Ex. 2). In his medical report of April 17, 1972, Dr. Reich concluded that despite the frequency of the Claimant's subjective complaints, his examination, including EKGs, showed that the Claimant's condition was static, and that he should perform light or sedentary work which would prevent psychogenic or musculoskeletal deterioration. (Resp. Ex. 3). Dr. Reich's final medical report of May 11, 1973 concluded in the same manner. (Resp. Ex. 4).

Dr. Harold Shub's medical report of June 2, 1972, repeated the same history and subjective symptoms of the Claimant as did his report of October 7, 1966, and concluded that the patient presented a clinical picture of a healed myocardial infarction associated with a severe anginal syndrome due to coronary insufficiency and severe impairment of cardiac function and efficiency. However, his conclusion differed in that he now found the Claimant to be totally disabled and incapable of any effort or exertion. (Cl. Ex. 2). This report was followed by a "Supplementary Report" of August 30, 1972, which only stated that in Dr. Shub's opinion, with a reasonable degree of medical certainty, the Claimant was totally permanently disabled as a result of his heart condition. (Cl. Ex. 3). Dr. Shub's medical report of June 8, 1973, is not unlike his June 2, 1972 report. (Cl. Ex. 4).

Decision of Administrative Law Judge.

Dr. Shub's testimony at the current hearing was much in line with his medical reports, however, he stated further that arterialschlerotic heart disease is progressive and that it may progress to the point of gradual narrowing of the lining of the coronary arteries and produce chest pains which are known as angina pains. The latter pains are due to the disparity between the blood oxygen nourishment the heart requires at any particular time and what can be delivered through these narrowed vessels. (Tr. 19). In comparing the electrocardiographic findings of October 2, 1966 and June 1, 1972, concerning the myocardial infarction, Dr. Shub testified that the latter electrocardiogram was a change for the better, since there was a contraction of the scar which did not dilate or cause an aneurysm, that it was not the scar area which produced the Claimant's symptom, but rather the arterialschlerotic process which was the cause of the disparity between the blood supply demanded and that given. (Tr. 23, 24). Dr. Shub further testified that the subjective complaints of the Claimant were a major basis for his opinion. (Tr. 25, 36). However, in reaching this conclusion, Dr. Shub was not aware that the Claimant had performed any type of work, or that the Claimant was driving an automobile. If the Claimant had advised him of this during his examinations, it would have altered his opinion. (Tr. 25, 26).

As to the medications taken by the Claimant, Dr. Shub stated that nitroglycerine tablets give immediate relief by dilating the blood vessels and in turn increasing the coronary flow by getting more blood through the narrowed vessels, and that vasodilators perform the same function except on a slower release basis. (Tr. 31). With regard to the taking of nitroglycerine tablets, Dr. Shub stated that many men who take them are capable of gainful employment or performing some type of work, and that it was up to the patient to tell him whether he was physically capable of it. (Tr. 32).

The Claimant, in his testimony before the undersigned, provided the same subjective symptoms as appears in the medical reports of both Dr. Shub and Dr. Reich, i.e., taking of nitroglycerine tablets for chest pain, is only able to walk a few blocks before getting winded, and that he cannot climb subway steps. Additionally, he testified that he is presently residing in Great River, Long Island, New York with his sister and has been living there for the past few years, since the death of his mother. Before that he resided with his mother in an apartment house at 78th Street, Brooklyn, New York. Further, that he had not performed any work for

Decision of Administrative Law Judge.

Mr. Anthony Esposito, who operates a lumber yard at 3803 Ft. Hamilton Parkway, Brooklyn, New York (Tr. 67); and in fact, had not performed any work since 1966 (Tr. 53); that his wife left him about six or seven years ago (Tr. 60); but that for the past four years, he has been going with a girl-friend, who lives on 64th Street, Brooklyn, New York, and that he contributes to her support (Tr. 65-66); that he generally spends his days in such activities as visiting a garage on 29th Street in Brooklyn, New York, visiting the union hall, and seeing people he used to work with (Tr. 61); and that he is a licensed automobile driver and that he does drive an automobile (Tr. 58).

Mr. Anthony Esposito, owner of the lumber yard at 3803 Ft. Hamilton Parkway, Brooklyn, New York, testified with regard to a statement given to the Carrier on August 22, 1972. (Resp. Ex. 5) Contrary to Claimant's testimony, both the statement of Mr. Esposito and his testimony established that although the Claimant was not a payroll employee, for a three month period in 1971 the Claimant hung around the lumber yard and performed such odd jobs as sweeping the floor, helping with the customers and straightening out some of his stock. The Claimant did this for several hours a day, about three days a week. (Tr. 105-106) There is not indication that any of this activity on the part of the Claimant was taken into consideration by the Deputy Commissioner in his rejection of application for modification in 1969, or at any subsequent time, and certainly not the Claimant's activity at the lumber yard. Nor is there any indication that information concerning such activities was provided Dr. Shub, who testified that if he had been advised by the Claimant of activity of this nature, and that of driving an automobile, it would have altered his opinion. (Tr. 25, 26). It certainly must be presumed that at least for the past several years since the Claimant has been residing in Great River, Long Island, that either public transportation or his private automobile were utilized to visit the various locations in Brooklyn, i.e., Ft. Hamilton Parkway, 64th Street and 29th Street.

It is clear from the entire medical record in this matter that the Claimant suffered a posterior lateral myocardial infarction in 1966, a condition which both doctors subsequently concluded was well healed. Dr. Reich, who examined the Claimant in 1968, 1970, 1972 and 1973, concluded that the indident of

Decision of Administrative Law Judge.

the myocardial infarction has not resulted in any myocardial insufficiency. In comparison of the 1966 and 1972 electrocardiograms, Dr. Shub testified that there was a change for the better since there was a contraction of the scar which did not dilate or cause an aneurysm. Both doctors agreed that it was not the myocardial infarction which produced the Claimant's symptomatology, but rather the arterialschlerotic process which has caused the coronary arteries to become insidiously and progressively narrow, and that it was for the angina pains resulting from the inter-action of this condition that the various medications, nitroglycerine and vasodilators, were being administered.

I therefore find from the entire record in this matter, that if there has been "a change in conditions" it has been a change for the better, that the Claimant is not permanently totally disabled as a result of his injury of January 3, 1966, and that modification of the May 31, 1967 Compensation Award should be denied.

Since the Claimant has already received the maximum allowable compensation for an injury which occurred prior to the enactment of the 1972 amendments, he is not entitled to additional compensation.

With regard to the question of the constitutionality of the 1972 amendments to the Act, raised by the Respondent under "Point II" of his Brief, i.e., retroactive-prospective effect of the amendments, it is unnecessary for the undersignd, in view of the above findings, to consider this question. However, it should be noted here that although properly raised, an administrative proceeding is not the proper forum for testing constitutional issues, and that an administrative tribunal must assume the validity of the legislation which it administers. Engineers Public Service Co. v. S.E.C., 138 F. 2d 936 (1943); Public Utilities Comm. of Cal. v. United States, 355 U.S. 534, 78 S. Ct. 446 (1958); Panitz v. District of Columbia, 112 F. 2d 39 (1940); Budler v. First Nat. Bank, 16 F. 2d 990 (1927), cert denied 274 U.S. 743 (1927); Southern Boulevard R. Co. v. City of New York, 86 F. 2d 633 (1936).

Decision of Administrative Law Judge.

o

Counsel for Claimant has submitted a request for approval of an attorney's fee of $4,500.00, and has submitted as an attachment, a schedule of the time and effort expended by him in representing the Claimant in the prosecution of his claim. It is well realized that since the Claimant was not successful in this matter, such fee cannot be assessed against the Employer, or Carrier. However, an attorney who properly and diligently represents a client in any matter is entitled to a fee commensurate with the services performed, whether he be successful in his efforts on behalf of his client or not.

Prior to the 1972 amendments, §928(a), 33 U.S.C. §928(a), provided that no claim for legal services, or any other services rendered, would be valid unless approved by the Deputy Commissioner or a court, if appeal of a compensation order were taken. The 1972 amendments to §928 provided, for the first time, an assessment of attorneys fees against the Employer, or carrier, if the claimant were successful. Subsection (a) provided for such assessment at the Deputy Commissioner-Administrative Law Judge level, while Subsection (b) additionally provided assessment for successful efforts before the Board. This latter Subsection also provides that "...In all other cases any claim for legal services shall not be assessed against the employer or carrier", i.e., cases where the claimant is not successful. The proscription is not that attorneys' fees shall not be approved, but rather that they shall not be assessed against the carrier. Additionally, Subsection (e) provides for prosecution and penalty for any person who receives a fee unless it is approved by the proper forum. Under the interpretation of the Board, as expressed in Director, OWCP v. Hemingway Transport, Inc., BRB 74-129 (August 6, 1974), attorneys would be denied any fee if unsuccessful, for their services on behalf of a claimant, no matter how much time was expended or how diligently they prosecuted their client's claim. This barrier would certainly discourage attorneys from accepting clients who wish to pursue their claim through formal proceedings or appeals.

Such interpretation is not in consonance with the practice of law, nor with the legislative history of amendments to §928. The summary of the Senate Report accompanying §2318, S. Rep. No. 92-1125, 92d Cong., 2d Sess., (Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 [GPO 1972, 70]) reflects the intent of the Senate Committee with regard to Legal Fees:

forget where you said

Decision of Administrative Law Judge.

"Section 2318 amends Section 28 of the Act to authorize assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals. Attorney's fees may only be awarded against an employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation. Attorneys' fees may not be assessed against employers (or carriers) in other cases.

In all cases, the amount of attorneys' fees payable to the claimant's lawyer (either by the employer or the claimant) is subject to approval by the Deputy Commissioner, Hearing Examiner, Board or Court, as the case may be." (Emphasis added)

In view of the above, and mindful that the Claimant in this matter has not been successful in pursuing his claim, I, therefore, approve the amount of $2,500.00 as a reasonable and equitable fee for Claimant's attorney, Angelo C. Gucciardo. However, this fee will not be assessed against the Employer or Carrier.

ORDER

IT IS HEREBY ORDERED:

1. That the claim filed herein by Vincent Salzano for modification of the Compensation Award, dated May 31, 1967 be, and the same hereby is, denied.

2. An attorney's fee in the amount of $2,500.00 is approved for Claimant's attorney, Angelo C. Gucciardo. However, such fee is not assessed against the Employer or Carrier.

Edward H. McGrail

EDWARD H. MCGRAIL
Administrative Law Judge

Dated: November 18, 1974
Washington, D. C.

Decision of Benefits Review Board Filed
August 20, 1975.

1975

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

VINCENT SALZANO Claimant-Petitioner v. AMERICAN STEVEDORES, INC. and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner v. AMERICAN STEVEDORES, INC. and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY Employer/Carrier-Respondents	FILED AS PART OF THE RECORD AUG 20 1975 (date) Carolyn D. McCready (Clerk) Benefits Review Board BRB Nos. 74-223 and 74-223A DECISION

Appeal from Decision and Order of Edward H. McGrail, Administrative Law Judge, United States Department of Labor.

Angelo C. Gucciardo (Israel, Adler, Ronca and Gucciardo), New York, New York, for claimant.

Joseph S. Manes (Minor and Manes), New York, New York, for employer/carrier.

Decision of Benefits Review Board.

Linda L. Carroll (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal by the claimant and the Director, Office of Workers' Compensation Programs, seeking review and reversal of a Decision and Order (74-LHCA-266) of Edward H. McGrail dated November 18, 1974 denying claimant's request for modification. The request for modification was filed pursuant to the provisions of the Longshoremen's and Harbor workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereafter referred to as the Act).

On January 3, 1966, claimant suffered an acute posterior lateral myocardial infarction in the course of his employment with American Stevedores, Inc., (hereafter referred to as the employer). A formal hearing was held before the deputy commissioner, and, on May 31, 1967, claimant was awarded temporary total disability benefits from January 4, 1966. Based on the medical evidence presented, the deputy commissioner found that the claimant had pre-existing arteriosclerotic heart disease which was asymptomatic prior to claimant's heart attack on January 3, 1966. Such condition had not

prevented him from performing his duties as a marine carpenter prior to January 3, 1966. It was further found that claimant had a tenth grade education and had been employed as a marine carpenter all of his industrial life. Claimant was 35 years old at the time of the heart attack.

Subsequent to the deputy commissioner's Order, the employer made several requests for modification under Section 22 of the Act, 33 U.S.C. §922, contending that claimant was no longer totally disabled. Each request for modification was denied. Compensation payments were terminated by the employer on July 30, 1972 because the statutory maximum for temporary total disability under the unamended Act had been reached. The claimant then filed a timely request for modification of the May 31, 1967 Order of the deputy commissioner contending that his disability is permanent and total. In his Decision of November 18, 1974, the administrative law judge held that claimant is not permanently totally disabled as a result of his injury of January 3, 1966. The administrative law judge also approved a fee for legal services rendered by claimant's attorney but ordered that it was not to be assessed against the employer.

The claimant and Director appeal contending that the administrative law judge erred in denying claimant's request

for modification. Further, the Director argues that it was also error to approve a fee for legal services rendered by claimant's attorney where the request for modification was rejected.

It is well settled that Section 21(b)(3), and the law as summarized in O'Keeffe v. Smith Associates, 380 U.S. 359 (1965), require that the administrative law judge's decision be affirmed by this Board if it is supported by substantial evidence, is not irrational, and is in accordance with law. The case before us is medically complex. Claimant's condition is complicated by the progressive advancement of underlying arteriosclerotic heart disease, such disease being asymptomatic before claimant's injury in 1966. Dr. Harold Shub, testifying on behalf of claimant, was of the opinion that there is a relationship between a trauma and the advancement of arteriosclerotic heart disease, that claimant's disability is permanent and total, and that claimant cannot return to his occupation as a marine carpenter. Dr. Nathaniel E. Reich, on the other hand, testified on behalf of the employer that claimant is presently suffering from only a "mild partial disability" as a result of the heart attack and that a myocardial infarction plays no part in the advancement of underlying arteriosclerotic heart disease. Although Dr. Reich stated that claimant is presently capable of work of a "light or sedentary nature",

he testified that claimant should not engage in strenuous physical labor. The record also reveals that claimant often visited friends at the lumber yard of one Anthony Esposito and would sometimes sweep floors or do other odd jobs to pass the time. Claimant was never on Mr. Esposito's payroll nor did he engage in any work-related activity on a regular basis.

Although Dr. Shub and Dr. Reich disagree as to the extent of claimant's disability, both agree that claimant has suffered a disability as a result of the 1966 heart attack which prevents him from returning to his former occupation as a marine carpenter. Once it is established that an employee is disabled from his regular employment, the burden is on the employer to come forward with evidence that the employee has actual opportunities to obtain other suitable employment. Offshore Food Service Inc. v. Murillo, 1 BRBS 9, BRB No. 73-141 (May 15, 1974); Brown v. Maritime Terminals, Inc., 1 BRBS 212, BRB No. 74-177 (Dec. 6, 1974); Mason v. Old Dominion Stevedoring Corp., 1 BRBS 357, BRB No. 74-182 (March 21, 1975). See Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I. 1969). The Act makes clear that "disability" is an economic and not a medical concept. 33 U.S.C. §902(10). Thus, an employee who is only partially disabled in a medical sense may well be permanently and totally disabled under the

Act when the claimant's age, education, work experience, and the availability of suitable employment are considered. Brown, supra; Mason, supra.

The record in this case reveals that the claimant is presently 44 years old, has a tenth grade education, and has worked as a marine carpenter all of his industrial life - an occupation from which he is now totally disabled because of a work-related injury. There has been no showing by the employer of actual suitable employment available to claimant. In fact, upon questioning, Mr. Esposito testified that he would not hire claimant because of his heart condition. There is no presumption that, merely because claimant is physically able to do light work, suitable employment is available to him. The testimony of Dr. Reich that claimant is able to perform "light or sedentary" work is not enough to sustain the administrative law judge's finding. There must be some showing that suitable employment is actually available to claimant. Thus, we hold that the administrative law judge erred as a matter of law in finding that the claimant is not permanently and totally disabled within the meaning of the Act.

The employer contends in his Response to the Petition for Review that, even if claimant is permanently and totally disabled, certain new subsections of Section 10

of the amended Act, 33 U.S.C. §910, which increase the benefits for pre-amendment injuries, are unconstitutional in that they authorize the taking of private property without adequate compensation. The Board declines to rule on such issue since the employer failed to submit a Notice of Appeal and Petition for Review requesting adjudication of that particular question of law. Therefore, such issue is not properly before the Board.

The administrative law judge, although he denied claimant's request for modification, nevertheless approved a fee for legal services rendered by claimant's attorney but ordered that it was not to be assessed against the employer. Such approval is not in accordance with law. This Board has consistently held that Section 28 of the Act, 33 U.S.C. §928, conditions any award of fees for legal services rendered by claimant's attorney upon the successful prosecution of a claim. Director, Office of Workmen's Compensation Programs v. Hemingway Transport, Inc., 1 BRBS 73, BRB No. 74-129 (Aug. 6, 1974); Wong v. General Dynamics Corp., 1 BRBS 90, BRB No. 74-126 (Aug. 20, 1974); Karacostas, Sr. v. Port Stevedoring Company, Inc., BRBS 128, BRB No. 74-176 (Oct. 7, 1974).

However, upon a finding that claimant is disabled within the meaning of the Act, claimant's attorney is entitled to a fee for legal services rendered before the

administrative law judge as well as for the work performed in the successful prosecution of this appeal. Any application by claimant's attorney for a fee for legal services must be submitted to the persons, administrative body, or court before whom the services were performed and must be accompanied by a complete, itemized statement of the extent and character of the work done, in accordance with the applicable Rules and Regulations promulgated pursuant to the Act. 20 C.F.R. §702.132; 20 C.F.R. §802.203.

Accordingly, the Decision and Order appealed from is reversed and the case remanded to the administrative law judge for appropriate action consistent with this opinion.

Ralph M. Hartman, Member

We concur:

Ruth V. Washington, Chairperson

Julius Miller, Member

Dated this 20th day
of August, 1975

1966, and I do not know what records were shown to me.

Decision of Benefits Review Board.

SERVICE SHEET

BRB No. 74-223: VINCENT SALZANO v. AMERICAN STEVEDORES, INC. and MICHIGAN MUTUAL LIABILITY COMPANY (74-LHCA-266)

Decision sent to all parties:

Joseph S. Manes, Esq. -Certified Mail-
Minor and Manes
11 Park Place
New York, New York 10007

Angelo C. Gucciardo, Esq. -Certified Mail-
Israel, Adler, Ronca and Gucciardo
160 Broadway
New York, New York 10038

Miss Laurie M. Streeter -Certified Mail-
Associate Solicitor
U. S. Department of Labor
Room N-2716, New Labor Bldg.
Washington, D. C. 20210

Judge Edward H. McGrail
Office of Administrative Law Judges
U. S. Department of Labor
Vanguard Bldg. Suite 720
Washington, D. C. 20036

Mr. Anthony F. Campo
Assistant Deputy Commissioner
U. S. Department of Labor
Office of Workers' Compensation Programs
1515 Broadway (At West 44th St.)
New York, New York 10036

Mr. Herbert Doyle
Director, Office of Workers' Compensation Programs
U. S. Department of Labor
Room S-3524, New Labor Building
Washington, D. C. 20210

A Yes.

Q How heavy is this timber that you have to lift?

A This day we was loading big stuff like six by eights.

Q How heavy was it?

A Over one hundred pounds.

Q Each?

A Yes.

Q Now, does your work as marine carpenter require you to work aboard vessels and go up and down ships and ladders and stuff?

A Oh, yes.

Q Since you testified the last time have you had any specialized training or additional schooling of any kind?

A Did I go to school, do you mean?

Q Yes.

A No.

Q Have you done any work since you had the last hearing up until the present time for wages?

A No.

Q Have you been under medical care since the last hearing up until the present time by reason of your heart condition?

A Yes.

Q Will you tell us who is treating you?

A I am down there at the NLA under Dr. Ku.

Q K-u?

Can you give us a picture so that the Judge knows how you feel?

A I feel bla. No power, no pep.

Q Well, you said that you take the nitroglycerin and what occurs that compels you to take the nitroglycerin?

A I get a pain in the chest.

Q How often do you get this pain in the chest?

A Sometimes I get it a few times or twice during the day and I don't have to take the nitroglycerin all the time I get the pain since it goes away right away.

Q When you get the pain in the chest and you take the nitroglycerin, how long does it last?

A The pain?

Q Yes.

A It starts to go away almost immediately, and it lasts about five minutes.

Q If you don't take the pill, how long does it last?

A It don't go away.

Q You said you take a bottle a month or one hundred a month and does a bottle consist of one hundred?

A Yes.

Q How many times in a day would you experience this discomfort in the chest?

A A few times.

Q What does a few times mean to you, sir?

Q Mr. Salzano, if I told you that Mr. Esposito has advised us that you performed some work for him in 1971, to wit, you swept out, handled the stock and waited on customers for a period of three months in 1971, would you say that is wrong?

A Yes.

Q You did not do that?

A No.

MR. MANES: I have no further questions of this witness, Your Honor.

REDIRECT EXAMINATION

BY MR. GUCCIARDO:

Q The ILA pension that you have, is that on the basis of the disability for your heart condition?

A Yes.

Q Is this given to you by union contract with the New York Shipping Association?

A Yes.

MR. GUCCIARDO: No further questions.

JUDGE McGRAIL: No, I do not have any questions. You may be excused, Mr. Salzano.

(Witness excused.)

We will now take a recess.

(Recess.)

JUDGE McGRAIL: The proceeding will come to order.

it would have been better if it had been withheld.

Let me ask you one direct question and it has to do with inadequacy in your sexual life with your wife, is that the problem, that your wife left you?

THE WITNESS: Inadequacy.

JUDGE McGRAIL: Inadequacy.

THE WITNESS: Can I whisper?

I couldn't function as a man. In other words, you know --

JUDGE McGRAIL: All right.

Does that satisfy, Mr. Manes?

MR. MANES: Yes.

I think I get the gist of it.

I asked the question to lay the basis for the following question.

BY MR. MANES:

Q Did you ever live at 1366 64th Street, Brooklyn?

A My girlfriend's house.

Q How long have you been going with your girlfriend?

A About four years.

Q Do you get a pension from the union, too?

A The ILA, yes.

Q How much is that?

MR. GUCCIARDO: Objection, Your Honor.

That is immaterial to the issues in this case.

forget where you said.

A A garage on 29th Street in Brooklyn.

It is like -- I guess you call it a garage and I know the people there personally.

Q Did you do any work there?

A No.

Q What do you do when you go there?

A Shoot the breeze.

All the guys -- that's right on the waterfront section and the people I work with all my life, they don't hang out there so they come down to see me.

They know I hang out there so they come down to see me.

Q Are you receiving a disability Social Security pension?

A Yes.

Q And how long have you been receiving that for?

A I don't remember exactly, but like about six months or a year after I first got hurt.

Q Was it upon my advice that you went down and you applied for this pension?

A Yes.

Q Are you still getting it up until the present time?

A Yes.

Q I just wanted to ask you one more time, and from the

quicker.

I have to object to that.

JUDGE McGRAIL: I overrule your objection.

BY MR. GUCCIARDO:

Q Mr. Salzano, how old are you now?

A I will be forty-four next week?

Q Are you living with your wife?

A No.

Q You are separated?

A Yes.

Q What is the reason for the separation?

A She left me about six or seven years ago.

Q Was this following the accident?

A Yes.

Q Was there anything in relation to that separation that was either directly or indirectly related to the condition?

A I don't understand the question.

Q Did your wife leave you for any reason of your heart attack and your symptoms?

A I was no more man.

Q When you say that you were no more man, what do you mean by that?

A I was no more man.

Q Is that what she said?

A Yes.

Q How do you spend your days, Mr. Salzano?

A Hanging around, going to places, play cards, down at the union hall, in the garage, or more or less seeing people I used to work with.

Q Do you know Mr. Esposito?

A Yes.

Q Who is he and what does he do?

A He owns a lumber yard on 38th or 39th Street and Fort Hamilton in Brooklyn.

Q Do you go there?

A Not a long time.

Q Did you go there?

A Yes.

Q Did you work for him?

A No.

Q What did you do there?

A Hang around.

I knew the people in the place and neighborhood.

That's where I originally had come from.

Q How long did you hang around?

A A couple of hours, two or three times a week.

Q Did you ever receive any earnings or pay from Mr. Esposito for anything you did at the lumber yard?

A Not five cents.

Q You said that you hung around somewhere else, and I

rulers away or hang up some screws, you know.

Q Now, sir, can you tell us whether or not you paid him?

A No.

I never paid him.

Q Did you carry him on your payroll?

A Never. No, sir.

Q Did he owe you any money?

A From time to time he borrowed a ten-dollar bill, a twenty-dollar bill.

Q Did he pay you or work it off?

A No, he never worked it off.

He paid me back.

MR. DiCONSTANZO: I am through.

JUDGE McGRAIL: All right.

CROSS-EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Esposito, are you personally a friend of Mr. Salzano?

A We became friends after awhile, sure.

Q Was he, in fact, a friend of one of your employees?

A I met him through my foreman who he was a close friend of.

Q Did he originally come to hang around your place to see the foreman?

A Because of the foreman, yes, and not for me.

day and the shortness of breath which is evidenc which are factors which would mitigate against the expenditure of any effort or exertion even in the cost of transportation.

Q Then, I should take it that he could not or should not drive an automobile by himself?

A I believe he should not.

Q And if I told you that as a matter of fact he has been driving automobiles and has held a chauffeur's license since 1966, would change your evaluation as to the degree of disability in this matter?

A No.

Q If he is able to do this without apparently any symptoms --

A It would not change my opinion. What he is doing and what he should do are two entirely different things.

Q To what degree are the subjective complaints related to you by the Claimant a significant part in your opinion of permanent total disability?

A I would say it would be a major part.

Q A major part?

A Yes.

Q So that if the credibility of the Claimant is compromised and hypothetically he has an exaggeration of complaints, might your opinion be changed?

A I would have to say that is a possibility.

evidence of contraction of the scar which is not a bad thing for the heart but he has not shown any clinical improvement so we would have to say that fortunately the scar did contract and did not dilate or cause an aneurysm or anything like that.

Q Doctor, the symptoms of which he complains, difficulty in walking and dysnea or shortness of breath, are they symptroms of myocardial infarction per se or symptoms of the underlying arterial schlerotic process that produces them?

A It is actually a combination of both.

Q Could you tell me how the scar area of the myocardial would produce the symptoms of which he complains?

A It is not the scarred area which is producing this.

Q Could the underlying arterial schlerotic process produce those symptoms?

A In part substantially, yes.

Q And is that the cause or the disparity between the blood supply demanded and that given?

A Yes.

Q Doctor, you said that he should not use public transportation, I think.

Is that correct?

A Yes.

Q And what is the reason for that?

A The presence of the premature ventricular contractions and the several anginal episodes that occur during the

Q I ask you, doctor, to compare the electrocardiographic findings you made on your examination of October 3, 1966 with the subsequent electrocardiographic findings you made on your two later examinations and tell me, in your opinion, there has been any change in the infarction and the postero-lateral wall.

A Yes.

There has been some contraction of the scar.

Q How is that evidence, doctor?

A Let's compare the tracing of 1961, 1972, and that of 10/2/66.

Of June 1, 1972 to October 2, 1966 and the lead one is the same and two shows the persistent presence of a wave and in the June 1, 1972 tracing, however, the T wave which was inverted in that lead was low but upright and I would consider that to be a change for the better and the AVF is about the same.

Also, in the V leads the T waves in V5 and V6 were inverted in 1966 and whereas they are upright now, so only the posterior component of the infarction is evidence in the tracing in the latter one, the 1972, which is indicative of part of the healing process and subsequent contraction of the scar.

Q In short, physiologically he is better?

A I wouldn't say he is physiologically better.

I would say that electrocardiographically there is

if the healed area no longer contains coronary nerve endings which are necessary to convey such pain and, furthermore, the coronary artery does not become occluded again at that same site, so this may on occasion be due to the insidious and progressive involvement of other unrelated coronary branches.

And especially since this is a progressive disease in everybody.

Q Would the fact that an individual who has arterial schlerotic heart disease suffers a myocardial infarction play any part in the advancement of the underlying disease itself?

A No.

The coronary arterial disease per se has an unexplained or imperfectly explained etiology even today, centering upon a probable cholesterol problem with many, many factors that may accelerate this situation.

Q When was the last time you saw Mr. Salzano, doctor?

A I saw him for the next and last time on 5/11/75 and arrived at the same conclusions.

Q Again, did you take an electrocardiagram?

A Yes.

Q What was that as compared to the prior electrocardiogram?

A Unchanged.

It showed the same picture.

Q Is there any evidence of heart failure in your

opinion?

A No.

There never was any evidence of myocardial insufficiency, also known as congestive heart failure.

Q None?

A No.

Q If such is present, what is that indicative of?

MR. GUCCIARDO: Objection, Your Honor.

The congestive heart plays no part in this particular case and a question along that line is immaterial.

JUDGE McGRAIL: I overrule your objection.

BY MR. MANES:

Q What does it mean if congestive heart failure is present?

A It means that there is decreased myocardial reserve and the heart is not able to keep up with average daily requirements.

Q Is that the situation in this case, doctor?

A We have no heart failure and never have had any of that.

MR. MANES: Your Honor, I have no other questions of the doctor.

As Respondent's Exhibit, I offer the report of Dr. Reich dated January 12, 1968, and the one of June 12, 1970, and the one of April 17, 1972, and the one dated May 11, 1973.

1960, and I do not know what records were shown to me.

All I know, is that I did get to see some ILA records which I have already referred to indicating that the Claimant began to have left chest pains lasting one or two minutes for two or three times daily and with dyspnea on climbing the flight of stairs and seen by an internist on 5/16/60, and the cardiologist later, and the latter noted that althought it was not related to effort that it was present for several years.

Now, they do not point out anything more than this and exactly what records are being referred to now; I do not know whether it is the same one, even.

There may be a lot of ILA records before, during and after.

MR. GUCCIARDO: Your Honor, the point I was wanting to make is we went into that before and he was told he had gastro disturbance and that was all, and the doctor admitted that on the record.

BY MR. GUCCIARDO:

Q Doctor, is it usual following a myocardial infarction to have chest pain?

A Well, that depends on the time interval, the degree of involvement of other coronary arteries.

Generally speaking, once a coronary artery becomes occluded with a myocardial infarction and it heals.

And as I pointed out before it cannot give rise to pain from the site that was involved.

It has to have its origin in other unrelated arteries simply effected by the same generalized disease process known as an arterial sclerosis or atheromatous degeneration.

Q Doctor, following a myocardial infarction does that compromise the situation of the blood supply to the heart?

A The blood supply to one of the arteries is definitely compromised but this is not all a downhill process.

Nature tries to compensate for the degeneration or the downhill course by two mechanisms.

One is to cause a hypertrophy of other muscle fibers of the heart so that the pumping effect may not be lost at all.

Secondly, collateral circulation tends to develop in these people.

Whether they balance each other out or not depends on certain factors in each individual.

Q Exactly my point.

But when you have this compromising of the circulation or the collateral or hypertrophic situation changes do not occur adequately to compensate, is it unusual for a man to have chest pain following this myocardial infarction?

A You are tying together something we have been talking about and now asking me another question and you have to separate the two parts of your question because they do not go

together in one answer.

Q Well, doctor, where you have collateral circulation build up following an infarction, does that always take over the circulation that was present before the infarction 100 percent?

A Yes, it can.

It fact, it can be so extensive so as to run from one artery completely around the heart and take care of the surface of the heart on the opposite side and this can be shown by coronary aspects in the lifetime of the patient in long subsequent studies.

Q You said it can, and is it also possible that it cannot?

A Of course, anything is possible as a generalization in medicine.

Q Where it does not compensate for the circulation present before the infarction, can this lead to a feeling of chest pain?

A No.

The chest pains, as I pointed out, have to be due to the involvement of other coronary arterial branches which eventually becomes similarly involved in the narrowing process due to the arterial schlerosis and this occurs in varying degrees and in varying rates of speed in the same person as well as in the general population.

Laws recommended standard of a maximum limit on benefits of not less than 200 percent of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts [1]	77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some States due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victim of an injury.

Compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill amends the act to provide coverage of longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment—excluding masters and members of the crew of a vessel—if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

It is our intent to permit a uniform compensation system to apply to employees who would otherwise be covered by this act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. We did not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise there is no intention of extending coverage under the act to individuals who are not employed by a person who is an employer, this is, a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

IMPROVEMENT OF THE BENEFIT STRUCTURE

MAXIMUM AND MINIMUM BENEFIT AMOUNTS

The basic requirement of the act is for the injured worker to receive 66⅔ percent of his average weekly wage. Historically, this two-thirds requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers.

The bill amends the act to provide that the maximum compensation for disability shall not exceed 200 percent of the national average weekly wage to be determined annually by the Secretary of Labor. The expectation is that a 200 percent maximum will enable approximately 90 percent of the work force covered by this act to receive two-thirds of their average weekly wage. In order to ease the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps as follows: 125 percent or $167 whichever is greater during the period ending September 30, 1973; 150 percent during the period beginning October 1, 1973 and ending September 30, 1974; 175 percent during the period beginning October 1, 1974 and ending September 30, 1975; and 200 percent beginning October 1, 1975. These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws.

To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent.

The bill also requires an annual redetermination by the Secretary which will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the act. A similar provision for upgrading benefits in future years for cases of permanent total disability or death benefits is contained in the bill. These employees will receive annual increases based on percentage increases in the national average weekly wage.

There is a requirement for a minimum payment of 50 percent of the national average weekly wage or the employee's full average weekly wage, whichever is less. The present minimum payment of $18 is unconscionable.

A separate computation of the maximum and minimum for nonappropriated fund employees is keyed to the GS schedule since such employees are closely related to the Federal employee program.

This bill also adds a very unique provision to assist those injured workers or the survivors who have been receiving compensation or benefits for total disability or death at levels ranging from less than $25 a week to the $70 a week maximum. The historical nature of workmen's compensation laws has left the injured worker with no provision for improvement of benefits even though we are all cognizant of living in a society where inflation and other factors have contributed to the increased cost of living on what is now an annual basis. The concept of increasing the benefits to the injured workers who will be receiving benefits after the effective day of this act is, of course, in line with our long-standing Federal policy for social security disability.

That particular provision, however, did not reach the several thousand cases who have been suffering these low maximums during the 45-year history of this act. Since many of the workers or survivors receiving these benefits were in the employ of companies no longer in business it was decided that the most appropriate way of taking care of the past benefit deficiencies for this group was to split the cost of upgrading these workers between the entire industry covered by this bill and the Federal Government. This will be done by a special assessment into the second injury fund and an appropriation from the Treasury. The cost to the United States is expected to be $2 million per year.

Another feature of the new benefit structure will be a provision whereby survivors of injured workers will continue to receive a portion of benefits in situations where a worker who is entitled to benefits for permanent total or permanent partial disability dies from causes other than the injury. Specific provision is made for protecting immediate survivors and making sure that scheduled awards are still paid in full. A further provision is made for payment of benefits due in scheduled award cases into the special fund under section 44 of the act when there are no survivors.

The benefit structure for survivors is altered to provide additional benefits for widows and children, and to expand the class of dependents entitled to receive benefits for survivors. The act is amended to increase funeral benefits from the present $400 to a more realistic amount of $1,000. The present act provides that a surviving wife or husband receives 35 percent of the award, and children receive 15 percent. The amended act will provide a 50-percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages.

A special definition of dependency is also provided in order to take care of dependents as defined in the Internal Revenue Code who would otherwise not be eligible under this section. Their benefits are 20 percent of the award.

A minimum death benefit tied to the applicable national average weekly wage but not to exceed the employee's average weekly wage is also provided.

The present law contains a maximum limitation of $24,000 exclusive of medical payments in cases of temporary total and permanent partial disability. S. 2318, following the recommendation of the National Commission amends section 14 of the act to eliminate any maximum on these types of compensation payments. This change will avoid any injustice to

A. Yes, They will be reviewable in the Court of Appeals.

It should be noted that under the present law, review of decisions by deputy commissioners is through injunction proceedings in the District Courts.

A second change which this bill would make would be to provide for a new procedure to obtain impartial medical evaluations in contested cases.

Q. How would this new procedure work?

A. Either party might request an examination by a physician employed or selected by the Secretary, and following that either party, if dissatisfied with the results of this examination, may request a further examination by one or more physicians employed or selected by the Secretary.

Another change provided in this bill would require the Secretary, upon request, to provide persons covered by the Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining this compensation, including assistance in processing a claim. The Secretary would have discretion to provide persons covered by the Act with legal assistance in processing these claims, if requested to do so. The Secretary is required to provide employees receiving compensation information on medical, manpower and vocational rehabilitation services, and to assist these employees in obtaining the best services available.

The bill also gives injured employees freedom to choose their own physicians from among those designated as authorized physicians by the Secretary. Under present law the employee is limited to a panel of physicians chosen by the employer and approved by the Secretary.

The bill also provides for a number of other administrative changes in the existing law.

Q. Will this bill change the benefits available under this Act, and, if so, how?

A. There are three parts to the benefit structure of the present law, and the bill affects two of these. The first aspect is that under present law, compensation is based on the injured individual's average weekly wage. Generally, he gets as compensation for his injury ⅔ of his average weekly wage at the time of injury. This basic formula is retained by the amendments. Second, the law prescribes maximums and minimums for weekly compensation. A disabled employee may receive no more than $70 per week and, unless his avearge weekly wage was less than $18, his weekly compensation for total disability may be not less than $18. The bill raises both the maximum and the minimum. The maximum is raised over a three-year period by a sliding percentage scale, so that by October 1975, it is 200 percent of the average nonagricultural weekly wage. The minimum is raised to not less than 50 percent of the national average weekly wage unless the totally disabled individual's average weekly wage at the time of his injury, as adjusted to reflect the subsequent percentage increase in the national average wage, is less than 50% of the national average. In such a case, the individual will receive his adjusted average weekly wage. Finally, under the present law, there is a total compensation maximum, applicable in all cases save those involving permanent total disability or death, of $24,000. The amendments eliminate this maximum.

Q. Do the amendments change the death benefits?

A. Yes. Under present law, the maximum allowed for funeral expenses is $400. The bill raises this maximum to $1000. Also, a surviving wife or dependent husband is now entitled to compensatory payments equaling 35 percent of the deceased's average wage, and 15 percent of the deceased's average wage for each dependent child. The percentage for the surviving spouse is raised by the bill to 50 percent and the percentage for each dependent child is raised to 16⅔ percent. The Act's present total compensation maximum of 66⅔ percent of the deceased's average wage is retained, but the bill provides that the average weekly wages of the deceased will be considered to be not less than the national average weekly wage unless his average weekly wage, as adjusted to reflect the subsequent percentage increase in the national average wage is less than the national average. In such a case, the death benefits will be based on the adjusted average weekly wage of the deceased.

Q. Even with the rate of inflation slowed down, we all expect costs to continue to rise somewhat. The benefit level seems adequate for today's situation, but what about the future?

A. The amendments include an adjustment feature to cover such contingencies. The adjustment is keyed to wage increases in the nonagricultural sector. It works in this way. Each year the Secretary of Labor will compute the percentage increase of the national nonagricultural average weekly wage over that of the previous year. If there has been no increase, benefits remain unchanged. If there has been an increase, benefit levels will be raised in proportion to the increase.

Q. How will the initial adjustments for persons injured prior to the enactment of the amendments be financed? Benefits for post enactment injuries can be covered by insurance, but insurance cannot be retroactive.

A. The "special fund" now provided for in the Act serves primarily as a "second injury fund." The fund is now financed by death benefit payments where there is no survivor and by fines and penalties levied under the Act. The proposed amendments would strengthen the financing of the fund by providing for assessments against carriers and self-insured employers.

The amendments provide that 50 percent of the cost of the initial and annual adjustments made in the benefits of persons injured prior to enactment of the bill will be paid from the "second injury fund." Thus these costs will be borne by the covered industries as a whole. The fund will be beefed up by an immediate interest-free Government loan which must be paid back within 5 years from the fund on a schedule arranged by the Secretary of Labor. The other 50 percent of the adjustment costs will be funded directly by the Government through appropriations.

COSTS

Q. What are the costs?

A. The only costs to the Federal Government for increasing benefits under the Longshoremen's bill will be 50% of the increase in benefits for those persons who have been declared permanently disabled, or are widows or survivors of such persons, prior to enactment of this bill. There are only an estimated two thousand persons in this category (1,500 under the current Longshore provisions and 480 in D.C.). Private industry will pay 50% of the cost of the increases for these persons, and the Federal Government will pay the other half. Those costs are estimated to be as follows:

[In millions of dollars]

1973	1.16
1974	1.74
1975	1.86
1976	1.95
1977	2.05

Maximum rate=⅔ of current average weekly wage, or $93. Federal share is 50% of that, or $47.

The only other additional cost to the Government would be that incurred in administering the provisions of the bill. Since there is an existing staff structure the increased administrative costs would be minimal. The Department of Labor has not been able to give a firm estimate of the additional administrative cost, because of the many variables involved, but indicate somewhere around $2.8 million additional will be needed. Current administrative costs are $1.4 million, which would mean a total of $4.27 million upon enactment for administration.

The point should be made that persons injured after the effective date of this act *will not* be compensated with Federal funds. Their benefits will be paid for by employers through compensation insurance.

DISTRICT OF COLUMBIA EMPLOYEE COVERAGE

Q. What is the impact of this bill on the District of Columbia?

A. District of Columbia employees have been covered under the Longshoremen's and Harbor Worker's Compensation Act since 1928. At the time this was done as a matter of convenience, but the Longshoremen's Act has become a sort of catch-all for Federal compensation coverage for other special areas. For example, the bill also covers compensation in overseas defense facilities and off-shore oil drilling rigs on the Continental Shelf.

Because the District of Columbia has no home rule, it is the responsibility of Congress to enact compensation laws. Because of the historic development it is felt that the District of Columbia coverage should be continued under the Longshoremen's Compensation Act. The point could also be made, concerning the cost of benefits, that it would be more expensive to transfer District of Columbia employees to the Federal Employees Compensation Act (FECA). The following comparison makes this point clearly:

WEEKLY BENEFITS

Benefit level: Minimum
Longshoremen's

50% of the National average weekly wage (50% of $140=$70).

FECA

70% of the first step of a GS–2 rate ($70.63).

Benefit level: Maximum
Longshoremen's

$167 (upon enactment) to increase to $280 by 1975.

FECA

75% of the top step of a GS–12 rate ($454.66).

Mr. QUIE. Mr. Speaker, as we are about ready to vote now, I think we should again bear in mind an agreement was reached between the employers and the employees' union, the people who are responsible to represent the men who work as longshoremen.

The question also before here is what happens to compensation. We ought to increase the compensation under the Longshoremen's Act. They cannot go to a State in order to have their compensation increased. We are the ones that have to do that. They are way below the Federal Employees Compensation Act, for example, and the same thing is true with respect to the District of Columbia employees. Also it would not be fair to the companies if we raise those presently drawing benefits by just increasing the cost to the companies, so there we provide that the Federal Government shall pay 50 percent of the cost.

We all agree with this. The only thing left, really, on which there is a big argument is on the doctrine of seaworthiness. That doctrine is retained for the seamen.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN STEVEDORES, INC., and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

against

VINCENT SALZANO,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella , being duly sworn, deposes and says thatshe is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on December 9, 1975 , she served 2 copies of Brief for Petitioners and 1 copy of Appendix
on

Angelo C. Gucciardo, Esq.,
Israel Adler Ronca & Gucciardo, Esqs.,
160 Broadway,
New York, New York.

Solicitor of Labor,
Attorney for Director, Office of Workers Compensation Programs,
Division of Employees Benefits
U.S. Dept. of Labor
Washington D. C. 20210

ATT: Linda Carroll

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
9th day of December , 1975

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30 0932350
Qualified in Nassau County
Commission Expires March 30, 1977